

Sanchez v Tropp
2022 NY Slip Op 35217(U)
March 30, 2022
Supreme Court, Nassau County
Docket Number: Index No. 603251/2020
Judge: Christopher G. Quinn
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU CIVIL TERM PART 18**

Present: HON. CHRISTOPHER G. QUINN
Justice of the Supreme Court

JONATHAN SANCHEZ,

Plaintiff,

INDEX NO: 603251/2020

-against-

MOTION SEQ. No. 001 - MD

MOTION SEQ. No. 002 - MG

MAURICE TROPP,

Defendant.

The following papers were read on this motion:

(NYSCEF Nos. 12-51)

Plaintiff seeks an Order granting him summary judgment on the issue of liability.

Defendant opposes and seeks summary judgment dismissing the Complaint pursuant to CPLR § 3212 and Insurance Law §§ 5102 and 5104. This action arises out of an automobile collision on November 26, 2019.

Defendant seeks summary judgment through this motion based on the fact that plaintiff's claim does not establish a "serious injury" within the meaning of the Insurance Law as a result of the subject accident.

It is alleged in plaintiff's Verified Bill of Particulars that he suffered injuries, as a result of the subject accident. This included bulges to his Lumbar Spine; at L3-L4; L4-L5; L5-S1; L5-S1 disc herniation approaching the exiting left L5 nerve root; and Lumbar radiculopathy. He also alleges herniations to his Cervical Spine: C3-C4; C4-C5; C5-C6; and Right C7 radiculopathy. He also alleges a left foot sprain.

At his deposition the plaintiff testified that as a result of the violent collision his airbags deployed and his stomach hit the steering wheel. He testified that his head struck the airbag. Plaintiff reported no injuries at the scene of the accident in the Police Report.

Plaintiff testified he was driven from the scene to Southside Hospital where he was treated and released, with pain in his neck and back. He testified he began treatment on December 2, 2019. He underwent physical therapy three times per week until the facility shut due to COVID in March 2020. He returned in April and continued to October, only stopping when Workers' Compensation ended his coverage. Plaintiff testified that this injury resulted in him doing less work around his home and stopped him from umpiring baseball games.

Defendant argues that plaintiff's injuries, as claimed in his Bill of Particulars, are subjective, non-permanent, minor, speculative, subjective, and do not constitute a "serious injury" as defined by New York State Insurance Law § 5102(d).

Defendant provides a report of an Independent Neurological Exam conducted by Dr. Paul Lerner on March 10, 2021. Plaintiff was found to have no restriction of the range of motion in the cervical or lumbar spine, and there were no objective findings of diminished sensation. Dr. Lerner stated that his examination did not reveal any objective abnormalities. There is no evidence of radiculopathy, and no objective evidence on examination of any neurologic disability or permanent impairment (NYSCEF No. 33).

Defendant argues that due to Dr. Lerner's objective medical findings, it is clear that plaintiff has not suffered a "permanent loss of use," as contemplated by the State of New York. Dr. Lerner concluded that plaintiff had no restriction in his range of motion in either the cervical or lumbar spine, nor was there any evidence of radiculopathy, disability, or permanent impairment.

In opposing this motion counsel for the plaintiff argues that plaintiff's testimony and medical examinations establish threshold injuries.

Plaintiff provides medical records, including evaluations by Dr. Lam Quan. A review of those records reveal nothing that demonstrates a "total" loss of use in any respect. In the July 19, 2021 report, Dr. Quan states that plaintiff "has reached maximum medical improvement with physical therapy." This is in direct opposition to findings at prior visits (NYSCEF No. 44).

Plaintiff's first visit on December 2, 2019 and subsequent visits through October 26, 2020 show better ranges of motion than what is demonstrated in the July 19, 2021 report.

Dr. Quan's records regarding range of motion contradict her previous reports. Dr. Quan did not evaluate plaintiff for nine months between October 2020 and July 2021. In the October 26, 2020 visit, Dr. Quan stated plaintiff reached "maximum medical improvement." The restrictions found on July 19, 2021 cannot be considered to be a "maximal" improvement of plaintiff's range of motion when over a year prior from December 2019 to October 2020, the plaintiff's range of motion in the complained of areas was reportedly better.

Dr. Quan's assertions that the plaintiff is partially disabled, is inconsistent with plaintiff's medical records. At no point during plaintiff's range of motion testing from December 2019 to July 2021 is plaintiff's total range of motion measured at only 50%. The records reveal, however, that in almost every exam, including on July 19, 2021, plaintiff's ranges of motion are recorded above that. Dr. Quan's reports are inconsistent and do not support a finding that plaintiff suffered a "permanent loss of use."

Plaintiff contends his MRI reports reveal not only herniated or bulged discs, but also tears. He claims that these, combined with his subjective reports of limitations, establish serious physical injury. The MRI reports do not state that any herniations or bulgings are significant (NYSCEF No. 45). Neither were the pain or injuries reflected in the August 8, 2020 evaluation (NYSCEF No. 46).

Allegations of disc based injuries in the spine are not sufficient by themselves to establish a "serious injury." There must be objective proof demonstrating a limitation from the injury that is more than a "minor, mild or slight limitation of use" [*Licari v. Elliot*, 57 NY2d 230, (1982); *Pommells v. Perez*, 4 NY3d 566 (2005); *Meely v. 4 G's Truck Rentino Co.*, 16 AD3d 26 (2005); *Kearse v. New York City Transit Auth.*, 16 AD3d 45 (2005)]. The plaintiff fails to provide such objective proof.

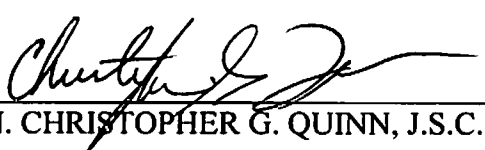
The plaintiff failed to prove that he was "medically determined" to have suffered an injury or impairment, which prevented the performance of "substantially all" of the material acts of his usual and customary daily activities for ninety (90) of the one hundred eighty (180) days after the accident. Absent any objective medical findings does not establish the existence of a "serious injury" [*Phillips v. Costa*, 160 AD2d 855 (2nd Dept 1990)]. Plaintiff must also supply medical evidence proving that he was incapable of going to work as a result of injuries sustained in the accident [*Iglesias v. Inland Freightways, Inc.*, 209 AD2d 479 (2nd Dept 1994)].

In this instance, the plaintiff has failed to offer such evidence. Plaintiff alleges that he was confined to his bed for approximately two weeks and then confined to his home for three weeks following the accident. Plaintiff's testimony establishes that his alleged injuries are not permanent and have not resulted in significant limitations. Plaintiff testified that he was working at the time of the accident, and never missed any time from his employment. In his application for new employment, he did not list any limitations he may have had, nor has he missed any time from his job there due to his alleged injuries stemming from this accident.

Based on the proof and arguments presented, the defendant's motion seeking summary judgment dismissing the Complaint is Granted . CPLR § 3212, Insurance Law §§ 5102 and 5104.

Based on that finding, the plaintiff's motion for summary judgment on the issue of liability is Denied, as moot.

It is **SO ORDERED**.


HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: MAR 30 2022

ENTERED

Apr 13 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE